SUPREME COURT, U. S.

No. 72-1162

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, *Petitioner*,

v.

NEW ENGLAND POWER COMPANY, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

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BRIEF FOR RESPONDENT INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

This brief is submitted by respondent, Independent Natural Gas Association of America (INGAA), in answer to the brief of petitioner, Federal Power Commission (Commission). INGAA is a non-profit trade association representing virtually all of the major natural gas pipeline companies of the United

States, all of which are subject to the jurisdiction of the Commission under the Natural Gas Act, 15 U.S.C. 717-717w. As it did in the Court of Appeals, INGAA will address itself to the Commission's Order No. 427 and the denial of rehearing (A. 87-114, 144-152) as they affect natural gas pipeline companies subject to the Commission's jurisdiction. This review involves only the power of the Commission to assess the annual charges prescribed by Order No. 427 and not the manner or reasonableness of the exercise of such power. INGAA did not challenge the validity of the fees assessed under Order No. 427 in connection with applications of pipelines for certificates of public convenience and necessity involving construction or acquisition of facilities, 15 U.S.C. 717f(c).

QUESTIONS PRESENTED

1. Whether Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) authorizes the Commission to impose upon natural gas pipeline companies annual charges to reimburse the United States for the Commission's cost of administering pipeline rate and accounting matters which do not benefit the pipelines.

2. Whether Title V permits the Commission to impose upon pipelines annual assessments to recoup the costs incurred in processing independent producers' certificate applications for authority to sell natural gas in interstate commerce.

STATEMENT

This case involves the imposition of substantial annual charges by the Commission upon electric public utilities and natural gas pipeline companies subject

to its jurisdiction. The purpose of these annual charges is stated by the Commission to be for the recoupment of its costs for the following regulatory activities (Br. p. 16):

> "(1) the producer certificate program; (2) pipeline rate regulation; and (3) the electric utility reliability and coordination programs. In addition, the portion of the costs of the Commission's pipeline regulation programs (other than rate regulation) and electric utility regulation programs which is not recouped from filing fees will be included in the annual assessments."

The Commission asserts that these annual charges are authorized by Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a. The United States Court of Appeals for the District of Columbia Circuit, in its opinion below, held to the contrary.

As stated above, INGAA addresses itself to the Commission's adoption of its Order No. 427 insofar as it imposes annual charges upon natural gas pipeline companies subject to its jurisdiction under the Natural Gas Act, other than the increased fees related to pipeline certificate applications which are not challenged.

A. The Legislative History of Title V and Its Implementation by the Bureau of the Budget

The Naural Gas Act contains no provision authorizing the Commission to impose fees or charges for the performance of the regulatory activities delegated to it by Congress. Such authority as it may have in this area can be derived only from Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a.

Title V authorizes federal agencies to prescribe fair and equitable fees for "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by such agencies to or for any person, except those engaged in the transaction of official business of the Government. The stated purpose of such fees is to render these services "self-sustaining to the full extent possible." Title V also provides that any fees prescribed shall be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."

Title V was inserted in an appropriations bill by the House Committee on Appropriations, H.R. 3880, 82d Cong., 1st Sess., p. 60. It reflected the concern of that Committee that "special beneficiaries" of services provided by federal agencies were not being adequately assessed for such services. Thus, in reporting out H.R. 3880, the Committee stated in pertinent part, H. Rep. No. 384, 82d Cong., 1st Sess., p.2:

> "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries."[1]

On the floor of Congress, Title V was discussed by Congressman Yates, an Appropriations Committee member and one of its sponsors, 97 Cong. Rec. 4809

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[1] The section of the Committee's Report entitled "Fees and Charges" is set out *in toto* in App. A, *infra*, pp. 1a-2a.

(1951).[2] He alluded to the growing complexity of problems confronting federal regulatory agencies and the resultant need for increased appropriations. In amplification, he took particular note of the services rendered to applicants for certificates and licenses by the Federal Communications Commission and the Interstate Commerce Commission. Essentially, Congressman Yates described Title V as a means to permit federal agencies to recoup "some of the costs" incurred by them particularly in the processing of applications for licenses, franchises and certificates through the establishment of fee schedules. Title V was enacted precisely as reported out by the House Appropriations Committee, 65 Stat. 290, 31 U.S.C. 483a.

Title V expressly provides for its implementation by the President of the United States. In the case of fee regulations by agencies in the executive branch, it provides that such regulations "shall be as uniform as practicable and subject to such policies as the President may prescribe." By direction of the President, the Bureau of the Budget (now Office of Management and Budget) first issued Budget Circular No. A-25, dated November 5, 1953. Budget Circular No. A-25 was subsequently revised and reissued under date of September 23, 1959 and is still in full force and effect.[3]

The general policy enunciated by the current Budget Circular A-25 in accordance with the terms of Title V is that "[a] reasonable charge, as described

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[2] Congressman Yates' discussion of Title V is set out in its entirety in App. B, *infra*, pp. 3a-5a.

[3] The Commission states that it has relied on Budget Circular No. A-25 of September 23, 1959 (A. 7, 93). This Circular is attached hereto as App. C, *infra*, pp. 6a-14a.

below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (App. C, *infra*, p. 7a). It further states that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (*id.* at p. 7a). However, Budget Circular A-25 states that no charge should be imposed for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" (*id.* at p. 8a).

B. The Proceedings Before the Commission

By its Notice of Proposed Rulemaking issued November 25, 1970, the Commission proposed for the first time to impose two types of annual charges upon natural gas pipeline companies (A.15-16). It also proposed to increase its existing fees covering the processing of applications by pipeline companies for certificates of public convenience and necessity involving the construction and acquisition of pipeline facilities in order to maintain its pipeline certificate program on a "self-sustaining" basis (A. 5).[4]

[4] The pipeline certificate fees, which have not been the subject of challenge, were originally established in 1966 by the Commission's Order No. 317, 35 FPC 30 (1966). At that time, the Commission made clear that it was attempting to make its pipeline certificate processing function self-sustaining and recognized the possibility that an increase in processing costs might necessitate increased fees, 35 FPC at 32. The increase in these fees prescribed by Order No. 427 is not in issue here.

The first annual charge, hereinafter referred to as the annual general charge, would recoup "the costs of administration of the natural gas pipeline programs" conducted by the Commission (A. 15). The Commission explained the purpose of the annual general charge, stating:

> "The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings . . ." (A. 5)

The Commission proposed that the total annual general charge designed to recoup its costs of pipeline rate regulation would be allocated to each Class A and Class B pipeline company in the proportion that each company's total gas deliveries bear to the total gas deliveries of all Class A and Class B companies (A. 16).

In addition, the Commission proposed a second annual charge, hereinafter referred to as the reserves added assessment, to be assessed against those pipeline companies required to file an Annual Report — Total Gas Supply on FPC Form No. 15. This assessment upon each pipeline company was to be one-tenth of a mill for each Mcf[5] of new reserves of natural gas certificated during the year, as shown on the particular company's FPC Form No. 15 (A. 16). The purpose of the proposed reserves added assessment is to recoup the Commission's cost of processing the certificate applications of independent producers seeking authorization to sell natural gas. The Commission noted that — for reasons of "administrative con-

[5] An Mcf is the equivalent of 1,000 cubic feet of gas.

venience" — it was imposing the costs of the producer certificate program not upon the producers but upon the pipeline companies (A. 5).

In its Notice of Proposed Rulemaking, the Commission relied upon Title V of the Independent Offices Appropriation Act of 1952 and Bureau of the Budget Circular No. A-25 dated September 23, 1959 as authority for the increased certificate application fees as well as the two annual charges (A. 4). The notice provided that any interested persons could submit written comments on the proposed rulemaking and should indicate whether a conference at the Commission was desired to discuss the proposed amendments (A. 1). INGAA and others requested such a conference, but the requests were not granted (A. 83, 145). Obviously, no hearing was held on the proposed rulemaking.

Following the submission of written comments by interested persons, the Commission issued its Order No. 427 on March 18, 1971 promulgating its rule substantially as proposed (A. 87-114).[6] INGAA and others objected to the two annual charges levied against pipeline companies to pay for the Commission's costs of pipeline rate regulation and its producer certificate program as being beyond the authority conferred by Title V.

In its Order No. 427, the Commission sought to justify the annual general charge within the meaning of Title V as implemented by Circular A-25, but it conceded that its regulation of pipeline rates "has provided continuing benefits to consumers." Never-

[6] Order No. 427 made certain modifications in the proposed rule. However, these are not material for present purposes.

theless, it insisted that this activity had benefitted the pipelines "by creating the economic climate for greater usage" of their services (A. 97).[7]

On rehearing of Opinion No. 427, the Commission was referred to its first schedule of fees adopted in 1966 which was also issued in reliance upon Title V and Circular A-25.[8] That fee schedule consisted of filing and processing fees for specific applications seeking specific authorizations under the Natural Gas Act. Before promulgating this schedule, the Commission carefully considered the validity of imposing charges upon pipeline companies to recoup the cost of its pipeline rate and accounting regulation under the Natural Gas Act as well as for recovering its costs relating to independent producer certificate matters.

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[7] Commissioner Carver dissented to that part of Order No. 427 which prescribed the annual charges here complained of, stating that in his view regulation in the public interest is "conducted for the benefit of the general public; it ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions" (A. 113). He concluded as follows (A. 114):

> "To the extent that Part 36 [the counterpart of Part 159.2a], added to our regulations by this order, attempts to recover administrative costs above and beyond those that have direct relation to a service rendered or privilege enjoyed (such as an annual charge on some *ad valorem* basis), it ceases to qualify as an authorized regulation establishing a fee structure. It is based on revenue requirements, rather than costs incurred or value received, and as such is more accurately defined as levying a tax. I find nothing in either the Federal Power Act or the Natural Gas Act, nor in Title V, Independent Offices Appropriation Act, 1952, which permits or requires us to levy and collect taxes.
>
> "The levy of an annual fee as a revenue measure is objectionable as bad public policy and is not legally sound."

[8] Order Nos. 317 and 317-A, 35 FPC 30, 392 (1966). Order No. 317 is entitled "Establishing Fees for Applications Filed With the Commission."

Acting in reliance upon Title V and Circular A-25, the Commission conceded its lack of authority to impose annual general charges comparable to the ones in issue now.

In the Notice of Proposed Rulemaking issued September 15, 1965, Docket No. R-282 (30 F. R. 12077),[9] resulting in the promulgation of its first fee schedule in Order No. 317, the Commission stated:

> "The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons." (App. D, *infra*, p. 16a).

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[9] App. D, *infra*, pp. 15a-21a.

In its order issued May 14, 1971 denying rehearing of Order No. 427 (A. 144-152), the Commission brushed aside the above-quoted language as dicta even though Title V and Circular A-25 have remained unchanged since the Commission issued its first fee schedule (A. 148-149). The Commission reiterated its generalized view that the annual general charge meets the standards of Title V since it is "predicated on the benefits accorded . . . natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress" (A. 149).[10]

C. The Decision Below

On petitions for review, the Court of Appeals set aside the annual general charge and the annual reserves added assessment imposed upon pipeline companies by Order No. 427 (Pet. App. 1a-13a).[11] Determining that Title V allowed the Commission "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public", the court concluded that these annual charges could

[10] In the same order, the Commission undertook for the first time to justify the imposition of the annual reserves added assessment upon pipeline companies on grounds other than administrative convenience (A. 149). This belated justification also constitutes an about-face by the Commission from its first rulemaking proceeding relating to specific fee assessments under the Natural Gas Act (App. D, *infra*, p. 16a). Commissioner Carver again dissented on the same grounds as stated with respect to the original order (A. 152).

[11] The Court of Appeals also set aside the annual charges assessed against public utilities to recoup costs of administering Parts II and III of the Federal Power Act, 16 U.S.C. 824 *et seq.* This aspect of the court's decision will be addressed by New England Power Company, a respondent herein.

not be imposed since their purpose is to recoup costs incurred in "the administration of programs benefitting the general public" (Pet. App. 7a, 10a). Regarding the annual general charge, the court "wholeheartedly" concurred with the position first taken by the Commission in 1966 that charges or fees designed to recover the costs of rate and accounting regulation of natural gas pipeline companies were inappropriate since these activities are primarily for the benefit of the general public rather than the regulated companies (Pet. App. 10a).

SUMMARY OF ARGUMENT

The Natural Gas Act confers no authority upon the Commission to assess fees and charges upon natural gas pipelines. Any such authority which it may have can only be derived from Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a. As the court below correctly held, Title V does not authorize the Commission to assess charges for the recoupment of the costs of its regulatory activities which do not confer special benefits upon the pipeline companies. The Commission ruled to this same effect in its order issued in 1966 when it first prescribed a fee schedule for pipelines (35 FPC 30). And the court below agreed with the Commission's first interpretation of the limited powers conferred upon it by Title V to assess fees and charges. The Commission has recently recommended to Congress that the Natural Gas Act be amended to grant the Commission specific authority to assess charges sufficient to make its activities self-sustaining to the full extent possible.

Title V and Circular A-25 limit the Commission's assessments of fees and charges to those designed to

recoup the costs of the Commission's services from which the pipelines derive a special benefit. This interpretation is supported by the legislative history of Title V. There is no justification in either Title V or Circular A-25 for the assessment of the costs incurred by the Commission in connection with its rate and accounting activities on an industry-wide basis. As stated by the court below, "only Congress can give authority to levy these fees" and it "has not done so here" (Pet. App. 10a).

In support of its contention that its charges are valid, the Commission alleges that its activities are of benefit overall to the pipeline industry. The fact of the matter is that its rate and accounting regulation are deterrents to the pipelines and whatever benefits flow therefrom redound to the ultimate consumers and the general public for whose benefit the Natural Gas Act was enacted. *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

The Commission's claims that it has provided financial stability for the pipeline industry by its various activities and has taken steps to increase supplies of natural gas are totally lacking in any support. As this Court is aware, the pipeline industry is now in the throes of a critical gas shortage. *Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972).

The Commission's other claims in purported justification of its action in charging the pipelines for the costs incurred in connection with independent producer activities are also without support. Whatever

benefits are provided by the independent producer certificate regulation redound only to the benefit of the producers and the ultimate consumers.

The decision below does not result in "virtual nullification" of Title V as contended by the Commission. The Commission is collecting substantial fees in connection with pipeline certificate matters which have not been challenged. It is also collecting substantial amounts charged licensees under Section 10 of the Federal Power Act, 16 U.S.C. 803, as specifically authorized by Congress.

ARGUMENT

TITLE V OF THE INDEPENDENT OFFICES APPROPRIATION ACT OF 1952 DOES NOT AUTHORIZE THE FEDERAL POWER COMMISSION TO LEVY ANNUAL CHARGES AGAINST NATURAL GAS PIPELINE COMPANIES TO RECOUP THE COSTS OF REGULATORY ACTIVITIES UNDER THE NATURAL GAS ACT WHICH DO NOT CONFER SPECIAL BENEFITS UPON THE PIPELINE COMPANIES.

The Commission argues in support of its contentions that the court below erred in setting aside Order No. 427 with respect to the annual charges since (Br. pp. 12-13):

(1) Title V refers to "groups" as well as individual special beneficiaries and, consequently, Title V applies where "the group specially benefited consists of the entire membership of an industry."

(2) The services whose costs will be supported by the Commission's annual fees provide special benefits to the natural gas and electric utility industries above and beyond those which accrue

from such services to the general public. The alleged benefits are stated to be:

(a) "a favorable economic climate in which they have grown and prospered;"

(b) "stabilization of rates and supply in both industries;" and

(c) the enhancement of "public confidence in and demand for their products, as against competing sources of fuel and energy."

(3) The fact that the Commission's activities are conducted primarily for the benefit of the general public does not make the assessment of charges for these activities inappropriate under Title V.

Title V was enacted on August 31, 1951, 65 Stat. 290, 31 U.S.C. 483a. It was not until over fourteen years later, on January 5, 1966, that the Commission by its Order No. 317 entitled "Establishing Fees for Applications Filed with the Commission" first imposed any fees upon companies subject to its jurisdiction, other than those specifically authorized under Section 10 of Part I of the Federal Power Act, 16 U.S.C. 803. Order No. 317 prescribed fees "relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemptions under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority" (35 FPC 30).

In its notice of rulemaking quoted above, and which culminated in the promulgation of Order No.

317, the Commission *sua sponte* determined that the types of annual charges prescribed by Order No. 427 would not be appropriate since the services involved are "primarily for the benefit of the general public rather than the regulated companies." It was this finding with which the court below concurred (Pet. App. 10a). The court below is correct and its opinion should be affirmed.

It is clear that the Commission, in adopting Order No. 427, was motivated more by the pressures applied by "Congressional appropriation committees" and Members of Congress than it was by its more considered views of its powers to impose fees and charges under Title V (A. 93). Not only is this shown by the language of Order No. 427, but also by the Commission's Annual Report to the Congress for the fiscal year 1972. It is there stated with respect to the basis for the Commission's promulgation of Order No. 427 as follows (p. 8):

> ". . . on March 18, 1971, the Commission at the repeated request of congressional appropriation committees adopted an order providing for the charging of fees in connection with the filing and processing of applications under Parts II and III of the Federal Power Act and the imposition of annual charges upon public utilities and natural gas pipeline companies under the Federal Power and Natural Gas Acts to reimburse the United States for the costs of administration of those statutes. However, the United States Court of Appeals for the District of Columbia in *New England Power Company, et al.* v. *FPC,* on August 15, 1972, 467 F. 2d 425, held that the Commission did not have the authority to impose an-

> nual charges (the question of filing fees was not in dispute)."

The Commission recommended to the Congress in order to extricate it from this current inability to impose annual charges upon the companies subject to its jurisdiction, that it enact legislation specifically providing the Commission with such powers. Such recommendation was stated as follows (p. 8):

> "In the light of the views expressed by the Committees and by Congressional statute that Government agencies should 'be self-sustaining to the full extent possible,' statutory clarification of the authority of governmental agencies to assess fees as well as annual charges is highly desirable."

As we shall show, Title V does not authorize the action taken by the Commission. By its Order No. 427, the Commission states that the annual charges imposed upon natural gas pipeline companies will "reimburse the United States for costs of administration of the Natural Gas Act" (A. 109). There are two types of annual charges in question. First is the annual general charge which recoups from pipeline companies the cost incurred by the Commission in carrying out its function of regulating pipeline rates under the Natural Gas Act. Second is the annual reserves added assessment by which pipeline companies bear the burden of the costs incurred by the Commission in processing certificate applications filed by the independent producers of natural gas. Both were set aside by the Court of Appeals.

Although the Commission states that the two annual charges will accomplish the above objectives, it adds that the annual general charge will also recoup such costs of the pipeline regulation programs, other than

rate regulation, which are not recovered by its increased certificate filing fees (Br. p. 16). The Commission has nowhere described these residual costs. On the other hand, the Commission has made clear that the increase in its pipeline certificate filing fees is designed to make its pipeline certificate program "self-sustaining" (A. 5).

As discussed below, the legislative history of Title V is not extensive, but it is more than sufficient to make its purpose clear.[12] Thus, in its report on TitleV, the House Appropriations Committee expressed concern that "the Government is not receiving full return from many of the services which it renders to special beneficiaries" H. Rep. No. 384, 82d Cong., 1st Sess., p. 2 (1951). Accordingly, Title V authorizes federal agencies to charge any person for designated services rendered and benefits conferred in order to make that service or benefit as self-sustaining as possible.

A. Title V of the Independent Offices Appropriation Act of 1952 Permits the Collection of Fees by a Federal Agency for Rendering Specific Services Which Confer Special Benefits upon Identifiable Recipients.

Title V provides, in pertinent part, that

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person (including groups, as-

[12] Title V has been characterized by the Senate Committee on Government Operations as a rider to the Independent Offices Appropriation Act of 1952, see S. Rep. No. 1467, 84th Cong., 2d Sess., p. 19 (1956).

> sociations, organizations, partnerships, corporations, or businesses), . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ."

In its report, the House Appropriations Committee explained the purpose of Title V as follows, H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2-3:

> "The Committee is concerned that the Government is not receiving full return from many of *the services which it renders to special beneficiaries.* Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations." (emphasis supplied).

There was virtually no debate on the floors of Congress concerning Title V. However, Congressman Yates, a member of the Appropriations Committee, discussed in some detail examples of the kind of services rendered by federal agencies to which Title V is directed. In the main, he discussed those agency services related to the processing of applications for li-

censes and certificates of convenience and necessity, 97 Cong. Rec. 4809 (1951).[13]

As the foregoing legislative history makes apparent, the intent of Title V was to encourage federal agencies to charge identifiable "special beneficiaries" for the costs incurred by the agency in providing the special benefits received. Plainly, Title V was not a revenue-raising measure designed to make all activities of a given federal agency self-sustaining.[14] Rather, Title V's purpose was only to authorize federal agencies to make those of its activities which bestow special benefits upon identifiable recipients as self-sustaining as possible through fee assessments.

This interpretation of Title V is fully supported by its implementation of it by the Bureau of the Budget (now Office of Management and Budget).[15] On November 5, 1953, the Budget Bureau issued its first Circular

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[13] App. B, *infra*, pp. 3a-4a.

[14] In its report on Title V, the House committee referred generally to other Congressional committees which were also engaged in studying the question of agency fee assessments for special services rendered, H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. One of those was the Senate Committee on Expenditures in the Executive Departments whose report was issued in 1950, S. Rep. No. 2120, 81st Cong., 2d Sess. In its report (at p. 1) the Senate committee stated its purpose:

> ". . . The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as non-reimbursable by transferring the financial burden thereof to the special beneficiaries . . ."

[15] As previously indicated, Title V provides that among the agencies in the executive branch, fee regulations "shall be as uniform as practicable and subject to such policies as the President may prescribe". This contemplated implementation of Title V was delegated to the Bureau of the Budget by the President.

A-25 under Title V entitled "Fees for licensing, registration, and related activities" to the heads of executive departments and establishments. Although now superseded, the coverage of the 1953 Circular A-25 [16] is worthy of note. It provided as follows:

> "This Circular covers the processing of applications for and the issuance, renewal, modification, transfer, or termination of any license, permit, certificate, charter, registration, exemption, or similar form of authorization granted or otherwise provided by Federal agencies . . ."

In explanation of the above-quoted language, the 1953 Circular made specific reference to the types of agency activities covered.[17] The only activity of the Federal Power Commission explicitly covered was the issuance

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[16] This Circular may be found in its entirety as Appendix A to S. Rep. No. 1467, 84th Cong., 2d Sess., pp. 244-46 (1956).

[17] The 1953 Circular stated in this regard:

> "Subject to the determination of any question as to the legal authority for establishing or raising fees (see paragraph 6), types of activities covered by the Circular include, but are not limited to, the following:
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> Certificates of public convenience and necessity issued by the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Communications Commission, and the Federal Power Commission;
>
> Patents granted and trademarks registered by the Patent Office of the Department of Commerce;
>
> Radio operators licenses and radio station licenses issued by the Federal Communications Commission;
>
> Registrations, conditional exemptions from registration, and qualifications filed with the Securities and Exchange Commission;
>
> Visas, passports, and similar permits issued by the Department of State;

(Footnote continued on next page)

of certificates of public convenience and necessity under the Natural Gas Act. In 1954, the Commission issued its first notice of rulemaking concerning fee assessments in reliance upon Title V and the 1953 Budget Circular.[18] By its 1954 notice, the Commission proposed fees for the filing and processing of certificate applications and export and import applications under the Natural Gas Act. However, this proposed rule was never promulgated by the Commission because of adverse Congressional reaction to Title V. See: S. Rep. No. 1467, 84th Cong., 2d Sess., pp. 9-11, 208 (1956).

It was not until 1966 that the Commission adopted its first fee schedule in reliance upon Title V and Circular A-25, dated September 23, 1959, Order No. 317, Docket No. R-282, 35 FPC 30 (1966).[19] As previously indicated, the Commission's fee schedule was deliberately limited to filing fees for various specific authorizations sought by application under the Natural Gas Act as well as a graduated processing fee for pipeline certificate applications thereunder.[20]

Airman certificates issued by the Civil Aeronautics Administration;

Vessel inspection certificates issued by the Coast Guard;

Certificates issued under the Pure Food and Drug Act; and

Licenses to classify, grade, or weigh agricultural products, issued by the Department of Agriculture."

[18] Notice of Proposed Rule Making dated February 3, 1954, Docket No. R-133, 19 F.R. 801.

[19] The 1959 Budget Circular is the current implementation of Title V upon which the Commission also relied in its Order No. 427, here in issue.

[20] The Commission at that time refused to impose user charges similar to the annual general charge in issue here, holding that its rate and accounting activities "are primarily for the benefit of the general public rather than the regulated companies" (App. D, *infra*, p. 16a).

Here, the Commission also asserts that in devising annual charges, it has "endeavored to adhere to the guidelines contained in Budget Circular No. A-25" of September 23, 1959 (A. 7, 93).

Circular A-25 states as a matter of general policy that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (App. C, *infra*, p. 7a). It also provides that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (App. C, *infra*, p. 7a). The Budget Circular then describes three circumstances where a special benefit will be considered to accrue to an identifiable recipient for which a charge should be made. In defending the two annual charges imposed upon the pipeline companies, the Commission relied (Br. p. 17) upon the circumstance where the Government-rendered service, in the words of the 1959 Budget Circular,

> "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft)."[21]

In implementing Title V by its Circulars, it is indisputable that the Bureau of the Budget was and is obliged to remain within the ambit of the Congressional intent behind Title V. As we have shown, Congress' intent was that fees should only be imposed upon "spe-

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[21] App. C, *infra*, p. 7a.

cial beneficiaries" of agency-rendered services and one of the principal services discussed by Congressman Yates, a sponsor of Title V, pertained to an agency's processing of applications for franchises, permits and certificates of public convenience and necessity. On the floor of the House, he stressed the great value conferred upon successful applicants for such licenses and certificates.[22] Consequently, when the Budget Bureau cites certificates of necessity and convenience and safety inspections of craft as examples of a Government-rendered service which "provides business stability or assures public confidence in the business activity of the beneficiary", the choice of examples should be considered highly significant. Yet, the Commission at no point alludes to the Budget Bureau's examples, nor does it attempt to discuss the strong probability that, consonant with the purpose of Title V, the Budget Bureau's examples were intended to limit the meaning to be attributed to the Bureau's broad phrases "business stability" and "public confidence."

Nowhere in Title V or Budget Circular A-25 is there any rational basis to justify the Commission's contention that whatever benefits accrue to the pipeline industry from its rate and accounting activities justifies the assessment of those costs on an industry-wide basis. The court below correctly held that such assessments were beyond the Commission's powers, stating (Pet. App. 10a):

> ". . . In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the

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[22] Congressman Yates also discussed the safety inspections of locomotives by the Interstate Commerce Commission as an example of an agency service which confers a special benefit for which a fee would be appropriate, 97 Cong. Rec. 4809 (1951).

> general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here."

The court's decision below is clearly correct. The Commission is currently availing itself of its true course of relief by seeking the appropriate statutory authority from Congress.

B. The Services Whose Costs the Commission Seeks To Recoup Through the Assessment of Annual Charges Have Not Been Shown To Provide the Natural Gas Pipeline Industry with Any Special Benefits.

In an effort to substantiate its annual charges, the Commission states that the regulatory activities to be supported by such charges are of "benefit overall to the members of both" the public utility and natural gas pipeline industries (A. 94). In reliance upon "a publication issued by a prominent member of the New York Stock Exchange", the Commission concluded that the exercise of the powers delegated to it by Congress has "provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (A. 97). Upon this same predicate, the Commission further concluded that "our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands" (A. 97-98). Upon the basis of these conclusory statements in its Order No. 427, and

without more, the Commission found that the annual charges assessed would be "equitable" (A. 98).

The Commission's brief in this Court attempts to bolster its assertions in Order No. 427 with its allegations that the Commission's rate and accounting activities in addition to benefitting the general public "also provide special benefits to the companies subject to the Commission's jurisdiction, above and beyond those accruing to the public" (Br. p. 16). The Commission alleges in its brief that its efforts to

> ". . . assure a more stable supply of natural gas, coupled with the Commission's regulation of pipeline rates to keep them at a just and reasonable level, have added to the competitive appeal of natural gas in the overall fuel market and thereby have encouraged consumers to invest in facilities for the use of gas" (Br. p. 19).

Because of these alleged benefits to the pipelines, the Commission states that it is therefore justified in assessing against the pipelines its costs for: (1) "the producer certificate program" and (2) "pipeline rate regulation" (Br. p. 16).

These purported justifications for Order No. 427 do not provide the requisite explanations required to justify the Commission's conclusions.[23] The decision of this Court in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) states with respect to the prerequisite for the Commission's orders to withstand judicial review as follows (*id.* at 792):

> "Judicial review of the Commission's orders will therefore function accurately and efficaciously

[23] *Texas Gulf Coast Area Natural Gas Rate Cases,* No. 71-1828, decided by the United States Court of Appeals for the District of Columbia Circuit on August 24, 1973 (Slip Op. p. 61).

only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."

The difficulty with the Commission's Order No. 427 is that the Commission is attempting to assign benefits to the pipelines which accrue only to the independent producers and to the general public. In large measure the alleged benefits are, in fact, deterrents to the pipelines. We shall review briefly what these alleged benefits to the pipelines are.

First, with respect to the Commission's conclusion that the exercise of the powers delegated to it by Congress has "provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (A. 97), the only basis for this conclusion is a footnote reference in Order No. 427 to a report issued by the Commission "in 1950 [which] discussed industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" for public utilities and licensees (A. 97). The only other references in the footnote are to a "publication issued by a prominent member of the New York Stock Exchange" and to some editorial comment found in a "trade publication."[24]

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[24] The Commission's report referred to is entitled *"Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees,* Federal Power Commission, 1950, pp. 19-20." It will be noted that this report is addressed to "Public Utilities and Licensees"—not pipelines.

No real basis is given to support this conclusion concerning the financial condition of the pipelines. The fact is as discussed below, and as this Court has noted, that the natural gas pipeline industry is in the throes of a crisis caused by the critical gas shortage. The Commission has itself indicated that the early field prices which it fixed did not bring forth adequate supplies of natural gas.[25]

The contention of the Commission (Br. pp. 18-19) that special steps taken to increase the interstate flow of natural gas during periods of shortage and the regulation of pipeline rates "have added to the competitive appeal of natural gas in the overall fuel market" is a myth. A Staff Report released by the Commission on July 16, 1973, shows that numerous pipelines have been required to curtail vast volumes of deliveries under firm commitments and that such curtailments will be very substantially increased in the future. In recognition of this critical period of gas shortages, the Commission has issued a Policy Statement prescribing curtailment procedures for pipelines subject to its jurisdiction by its Order No. 467 entitled "Utilization and Conservation of Natural Resources—Natural Gas Act", Docket No. R-469, issued January 8, 1973, as amended on January 15, 1973 and March 2, 1973 (18 C.F.R. 2.78; 38 F.R. 1503, 2170, 6384).[26]

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[25] *Texas Gulf Coast Area Rate Proceeding*, 45 FPC 674 at 686 (1971) and *Texas Gulf Coast Area Natural Gas Rate Cases*, — U.S. App. D.C. — decided August 24, 1973 (Slip Op. pp. 43, 110).

[26] In its Opinion in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) this Court commented on the "temporary and chronic natural gas shortages throughout the Nation" (at 626). Also throughout the Decision of the United States Court of Appeals for the District of Columbia in *Texas Gulf*

In support of its contention, the Commission cites *Fuels Research Council, Inc.* v. *Federal Power Commission,* 374 F.2d 842 (7th Cir. 1967). This decision does not support the Commission's conclusions. The case was an outgrowth of a condition in a certificate issued in 1959 to Midwestern Gas Transmission Company (Midwestern) in which the Commission tentatively accepted proposed rate schedules for sales to the distribution companies but directed the pipeline to file a new rate schedule within one month after the first year of operation which Midwestern did. A rate investigation was instituted by the Commission under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), concerning the Midwestern filing which was consolidated with a similar investigation instituted against Natural Gas Pipeline Company of America. Both companies serve generally the same areas.

That case involved markets for the sale of fuel for interruptible industrial boiler uses. The contest was actually between coal interests (three coal associations and a labor union) and the gas distributors. The coal interests contended that the pipeline rates approved by the Commission were artifically contrived, rather than based upon proper allocations of cost, to enable the distributors to block out the coal interests from the interruptible industrial boiler fuel market (*id.* at 849).

Aside from the fact that the Commission has now made a complete about-face and is discouraging inter-

Coast Area Natural Gas Cases, — U.S. App. D.C. —, decided August 24, 1973, the court makes recurrent references to the gas shortage. See also: *Southern Louisiana Area Rate Cases,* 428 F. 2d 407, 437 (5th Cir. 1970); *cert. den., Municipal Distributor Group* v. *Federal Power Commission,* 400 U.S. 950; *Public Service Commission of New York* v. *Federal Power Commission,* 467 F. 2d 361, 362 (D.C. Cir. 1972).

ruptible industrial boiler fuel sales during this period of critical gas shortages, it is readily apparent that it was the distributors and the ultimate consumers who were the beneficiaries of the Commission's approval of the contested rate designs.

The *Fuels Research Council* case simply highlights the purpose of the Commission's rate review functions under the Natural Gas Act and demonstrates the invalidity of the Commission's attempt to recoup its costs of pipeline rate regulation by means of the annual general charge imposed upon the pipelines. As the court below noted (Pet. App. 9a, n. 10), this Court has made clear that the primary beneficiaries of the Natural Gas Act are not the pipelines but rather the ultimate consumers of natural gas. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). In *Hope*, the Court observed that the fixing of just and reasonable rates was "the heart of the new regulatory system" established by the Natural Gas Act (*id.* at 611). The Court in *Hope* held that the rate provisions of the Act "were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies" (*id.* at 612).

In relying upon Title V and Circular A-25 as support for imposing the annual general charge upon pipeline companies to recoup the costs of regulating their rates, the Commission has wholly ignored the nature and purpose of its rate review functions under the Natural Gas Act.[27] Those functions are necessarily

[27] In this regard, it is noteworthy that the Commission has not sought to recoup its costs of producer rate regulation from the producers.

performed for the special benefit of the general public, the natural gas consumers of this nation.

Similarly, the reserves added assessment imposed upon the pipelines to recoup the Commission's costs of producer certificate regulation clearly contravenes Title V and the implementing criteria of Circular A-25. The Commission's present defense of this particular assessment upon the pipeline companies differs significantly from the nature of its rationalization of such imposition in the administrative rulemaking proceeding which resulted in Order No. 427. In proposing the annual reserves added assessment, the Commission simply stated that the costs of the producer certificate program would be paid by the pipelines "[f]or reasons of administrative convenience" (A. 5). Despite the submission of written comments objecting to this annual assessment,[28] the Commission promulgated it as proposed without any discussion of the objections raised (A. 16, 109). Following applications for rehearing of its Order No. 427,[29] the Commission for the first time sought to justify the reserves added assessment in its order denying rehearing on the ground that the processing of producer certificate applications bestows certain "clear benefits" upon the pipeline companies (A. 149).

The Commission now argues before this Court that although its producer certificate program does benefit the general public, the benefits received by the pipelines

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[28] See, for example, the "Views and Comments" of INGAA (A. 78-80).

[29] In their applications for rehearing of Order No. 427, INGAA and Tennessee Gas Pipeline Company continued to object to the reserves added assessment (A. 123-124, 133).

from this regulatory activity are "above and beyond those accruing to the public" (Br. p. 16). Nowhere does the Commission discuss the obvious fact that in applying for and obtaining certificates of public convenience and necessity from the Commission authorizing the sale of their natural gas in interstate commerce, the producer applicants are the special beneficiaries of the Commission's producer certificate program. Thus, the Commission chooses to ignore the plain language of Title V which expressly provides that a federal agency which issues a "certificate" to any person may charge such person a fee designed to cover the cost of providing the service. Further, Circular A-25 makes clear that recipients of certificates of necessity and convenience receive a "special benefit" for which a charge should be imposed (App. C, *infra,* p. 7a).

The pipelines are charged graduated fees for the processing of their own certificate applications and these fees are admittedly designed to make the Commission's pipeline certificate program self-sufficient. The pipelines do not complain of such fees, recognizing that as certificate applicants they are identifiable recipients of a special service rendered by the Commission. However, it is wholly inconsistent, inequitable, and violative of the intent of Title V to charge pipelines for the Commission's cost of providing a comparable service to the producers of natural gas.

When the Commission first considered the question of assessing user charges to render its producer certificate program self-sufficient, it is clear that it was considering the imposition of such charges upon the producers. However, in its Notice of Proposed Rulemaking issued September 15, 1965, Docket No. R-282, which culminated in Order No. 317 (35 FPC 30), the Commis-

sion concluded that this type of charge would be improper, stating (App. D, *infra*, p. 16a):

> ". . . The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, *both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons . . .*" (emphasis supplied).

The above-quoted language shows that although the Commission recognized that its producer certificate program provided certain benefits to producers, the primary beneficiary of such program was the general public since it involved the resolution of rate questions underlying producer certificate applications.[30] Consequently, the producers were not assessed any fees or charges associated with the processing of their certificate applications.

The Court has considered the treatment to be accorded rate issues in producer certificate proceedings, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). In that case, the Commission had certificated sales by producers at the initial contract price negotiated with the pipeline purchaser. The Court, however, directed the lower court to remand the producer applications to the Commission for further proceedings. In so doing, the Court noted that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effec-

[30] At that time, the Commission properly considered its rate regulation activities as being performed "primarily for the benefit of the general public rather than the regulated companies" (App. D, *infra*, p. 16a).

tive bond of protection from excessive rates" and that the heart of the Act is its certificate and rate provisions (360 U.S. at 388). Consequently, the Court held that although the rate provisions of the Act are not directly applicable to a certificate proceeding, "a most careful scrutiny and responsible reaction to initial price proposals" are required of the Commission in producer certificate proceedings (360 U.S. at 391).

The Court suggested that the Commission could carry out this regulatory responsibility by attaching a price condition to the certificate granted to the producer "[w]here the proposed price is not in keeping with the public interest" (360 U.S. at 391). Thus, it is reasonable to conclude that a controlling standard in the Commission's performance of its producer certificate responsibilities is the protection of the consumers from excessive rates. Viewed in this context, restrictions placed upon producer rates by the Commission in the producer certification process necessarily are for the primary benefit of the consumer.

The Commission, however, claims that its producer certificate program benefits the pipelines in such a manner as to justify the imposition of the costs of such producer regulation upon the pipelines. Examples of such alleged benefits are (1) the elimination of indefinite price provisions in producer contracts, (2) standardization of the quality of gas delivered by producers, (3) the establishment of reasonable terms and conditions regarding advanced payments for gas made by pipeline operators to producers and (4) the "special steps" taken by authorizing expedited deliveries through the issuance of temporary certificates and the promulgation of its optional certification procedure (Br. pp. 18-19).

With respect to the elimination of indefinite price provisions, this Court sustained the Commission's rulemaking order on this matter on the grounds that the Commission was acting to protect "the consumer interest." *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33 at 41 (1964), citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). This Court made clear in *Texaco* that the Commission's rulemaking there involved was for the protection of "consumer interests" against "a built-in device for ready manipulation of rates upward" (*id.* at 42). Obviously both the Commission and this Court in *Texaco* were concerned not with the pipelines but with the ultimate consumers.

As for the standardization of the quality of gas, it is the ultimate consumer who is protected by any such action since he is the one who is burning the gas and if the Btu content of the gas which he purchases is either high or low it is his bill which is affected.

The Commission's claim that its supervision of advance payments [31] for gas made by pipelines to producers confers a special benefit upon pipelines is also untenable. In dealing with the problem of very substantial advance payments required to be paid by the pipelines to producers for gas prior to its delivery, the Commission has permitted pipelines to include advance payments in their rate base under specified conditions. Certain rulemaking orders of the Commission permit-

[31] Advance payments are an outgrowth of the existing gas supply shortage. In order to generate the investment capital needed for the development of gas reserves to alleviate this crisis, producers have required advance payments from the pipelines as a condition to entering into gas sales contracts, Notice of Proposed Rulemaking, issued January 23, 1970 in Docket No. R-380, 35 F.R. 4008.

ting such rate base treatment have been affirmed. *Public Service Commission of New York* v. *Federal Power Commission*, 467 F.2d 361 (D. C. Cir. 1972).[32]

There, the court of appeals observed that at the time the orders in question were issued it had become well-known that a dangerous shortage of gas was developing and that in according rate base treatment to advance payments, the Commission "hoped thereby to encourage development by producers, and thus help alleviate the gas shortage" (467 F.2d at 366). The court found these orders to be "a reasonable attempt to increase the available capital for development of gas production" by the producers (467 F.2d at 369). The court of appeals viewed the treatment accorded to advance payments by pipelines as follows (467 F.2d at 369):

> ". . . the FPC has made an allocation between competing interests (here the interests of the consumers in keeping the rates low and the interests of the producers—and, indeed, ultimately the consumers—in having more capital available for development of gas production capabilities) . . ."

Thus, it is apparent that the primary beneficiaries of this particular regulatory activity are not the pipelines. The Commission's assertion to the contrary is wholly unsupported.

As for temporary certificates granted to individual producers upon their request, this is a long-standing practice of the Commission. It is beyond dispute that the regulation under which the Commission issues temporary certificates to producers is clearly designed to

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[32] This decision is erroneously cited in the Commission's brief as 462 F. 2d 853 (Br. p. 18, n. 10).

protect the producer applicants from emergency situations directly affecting their own economic interests. Thus, the regulation permits the Commission to certificate a sale of gas by a producer on a temporary basis without prior notice or hearing in an emergent situation relating to the particular producer applicant. The regulation defines an emergency as including "drainage, threatened loss of lease, flaring, economic hardships resulting from payment of shut-in royalties, or similar situations", 18 C.F.R. 157.28(a).[33]

The decision cited by the Commission regarding the issuance of temporary certificates to producers upheld the Commission's regulation as valid and only highlights the indisputable fact that the primary beneficiary of a temporary certificate issued to a producer is the producer himself. *Public Service Commission of New York* v. *Federal Power Commission*, 327 F.2d 893, 896, 897 (D.C. Cir. 1964). This Court's decision in *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9, 40-41, 44-45 (1968) serves to corroborate the foregoing.

Similarly the optional certification provisions of the Commission's regulations (18 C.F.R. 2.75, 37 F.R. 16196) are designed primarily for the benefit of the producers by permitting them, under the conditions specified, to put into effect a contract rate notwithstanding that it "may be in excess of an area ceiling rate established in a prior opinion or order of this

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[33] This regulation has been in effect since 1956, Order No. 193, issued November 20, 1956, Docket No. R-155, 16 FPC 497. It has not been modified, in material part, since its promulgation long before any indication of a gas supply crisis had become apparent.

Commission", 18 C.F.R. 2.75(e). The objective of the Commission's provision for optional pricing is the same as its regulations covering advance payments, namely, to stimulate the introduction of new gas supplies into the interstate market. The issuance of a certificate under these provisions of the Commission's rules "shall constitute a final determination that the rates, charges, and services therein specified are just, reasonable, and required by the present and future public convenience and necessity", 18 C.F.R. 2.75(l).

It is thus clear that the services whose costs the Commission proposes to recoup through annual charges assessed against the pipelines do not provide the pipelines with any special benefits within the intendment of Title V. Whatever special benefits result from such services accrue to either the producers, the consumers, or both.

C. The Decision of the Court Below Simply Restricts the Commission's Assessment of Fees and Charges to the Intent of Title V.

The Commission's brief, as in the case of its Order No. 427, ignores the fact that the Commission has, in reliance upon authority conferred by Title V of the Independent Offices Appropriation Act of 1952, made many of its activities self-sustaining by the imposition of fees upon applicants for relief under various sections of the Natural Gas Act.[34] Other substantial fees

[34] Under Part 159 (18 C.F.R. 159.1, 31 F.R. 431, 4890) of the Commission's regulations, specified fees are assessed in connection with applications for: exemptions under Section 1(c) of the Natural Gas Act, authorizations to export or import natural gas, permits under Executive Order 10485 relating to applications for authority in connection with facilities located at the borders of

and charges are collected by the Commission pursuant to authority conferred upon it under Part I of the Federal Power Act, 16 U.S.C. 791a, *et seq.* (See the Commission's 1972 Annual Report to the Congress, App. B, Table 2, Collections).

The allegation that the lower court's decision results in "virtual nullification" of Title V is simply not true (Br. p. 21). The court by its decision was not displacing the Commission's view of "desirable public policy" but was only confining the Commission to the powers conferred upon it by Title V.

The Commission contends that the "rather sparse legislative history of Title V" confirms its views of the correctness of its assertion of power to impose the annual charges in question (Br. p. 23).

A full discussion of the legislative history of Title V has been set forth at pages 3-6 above. The Commission's brief argues that nothing in the report of the House Committee on Appropriations or elsewhere in the legislative history states that it would be "inappropriate" to charge for services by annual charges and assessments where, as here, "there is no other provision of law prohibiting such charges" (Br. p. 23). Jurisdictional powers are not conferred by the absence of a prohibition but rather by an affirmative grant of authority. The decision of the court below is clearly in

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the United States for the export or import of natural gas to or from a foreign country, orders under Section 7(a) of the Act, for abandonment of services or facilities under Section 7(b), certificates under Sections 7(c) and (e) of the Act, determinations under Section 5 of the Outer Continental Shelf Lands Act, and for amendments to applications for any of the aforesaid authorizations.

conformity with the legislative intent of Congress in enacting Title V.

The Commission makes reference to *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (Br. pp. 7, 14-15, 24-25) in which decision the United States Court of Appeals for the Fifth Circuit upheld the fee schedules prescribed by the Federal Communications Commission for the broadcasting and cable television industries. Sections I and III of the opinion, which discuss the fees assessed broadcasters and cable TV operators, make clear that both industries are protected against encroachment upon their service areas in much the same way as the Federal Power Commission protects the natural gas pipeline industry by requiring pipelines to obtain certificates for the entry into a new market or for the expansion of their facilities serving existing markets. INGAA does not challenge the Commission's authority to impose fees to recover the costs of administering the pipeline certificate programs.

But as the Commission recognized in its petition to this Court requesting that certiorari be granted, the nature of the Federal Communication Commission's regulation of the broadcast and CATV industries is "sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different agencies difficult" (Pet. p. 16). This is clearly correct. We believe that the nature of the assessments involved here and those involved in *Clay* are so different that each case must stand on its own feet.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it sets aside the annual charges levied against natural gas pipeline companies by Order No. 427 of the Federal Power Commission.

Respectfully submitted,

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September 19, 1973

APPENDIX A

The portion of H. Rep. No. 382, 82d Cong., 1st Sess. (pp. 2-3) pertaining to Title V of the Independent Offices Appropriation Bill of 1952 is as follows:

FEES AND CHARGES

The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and considerations.

APPENDIX

It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 50) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

APPENDIX

APPENDIX A

The portion of H. Rep. No. 384, 82d Cong., 1st Sess. (pp. 2-3) pertaining to Title V of the Independent Offices Appropriation Bill of 1952 is as follows:

Fees And Charges

The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.

It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 60) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. It is not the Committee's intention in including this provision to disturb existing practices with respect to charges for postal services, sales of power, or the interest on loans by the Government.

APPENDIX B

The statement of Congressman Sidney R. Yates made on the floor of the House of Representatives on May 3, 1951 in explanation of Title V of the Independent Offices Appropriation Bill, 1952 (H. R. 3880) as reported out by the House Committee on Appropriations in H. Rep. No. 384, 82d Cong., 1st Sess. is as follows (97 Cong. Rec. 4809):

For the first time, our subcommittee went into a new question, the question as to whether or not there should be charges and fees made by regulatory agencies of the Government for many of the services which they render to those who come within their jurisdiction. One of the great problems that faces our country is the difficulty of the regulatory commissions to cope with the complexities of our growing industralized society, to deal with the regulatory problems for which they were created and with which they are confronted. A realistic appraisal of their function requires increased appropriations, because their problems and difficulties grow as our economy grows. As an example I cite the Federal Communications Commission. The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses, franchises, and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to

assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit making. Such companies should assume a greater share of the costs, because regulation is necessary. I think also that the Government should be able to recapture some of the costs that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it requires a rather nominal license fee.

The Interstate Commerce Commission is required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on applications for certificates of convenience and necessity for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application, and in the operation of which franchise it is protected from competition.

Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge for a portion of the operations of the agency, and in each event the Commissioner thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible, but would deter and do away with many superfluous applications. Therefore, the subcommittee in its de-

liberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own operations to see whether or not it would be possible to recapture for the Government some of the costs that the Government incurs in connection with this regulation through the establishment of a schedule of fees.

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

September 23, 1959 CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of

Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be

established solely for this purpose. The cost computation shall cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the agency's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standards, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, exceptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes in existing law.* In cases where collection of fees and charges for services or property in accordance with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS
Director

Attachments

ATTACHMENT A
CIRCULAR No. A-25

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports shall be prepared on Standard Form No. 4, as illustrated in Attachment B. An original and two copies will be required.

The initial report should represent a complete inventory of all services of the agency which provide a special benefit to recipients above and beyond those accruing to the public at large, and all activities under which federally owned resources or property are or could be sold or leased.

Subsequent reports covering the annual review of costs and charges shall cover only (a) services and activities not reported earlier; (b) services and activities for which charges have been changed; and (c) services and activities for which changes in the applicable category (as described below) have taken place.

2. *Preparation of Standard Form No. 4.*

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the initial report.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an identification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding systems for this purpose.

(2) List each special service provided under a heading "Special services", and each lease or sale activity under a heading "Lease or Sale."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account (excluding deposit funds) to which the collections were or will be credited.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery or fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

On reports subsequent to the initial report, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-282

ESTABLISHMENT OF FEES TO BE PAID BY APPLICANTS FOR NATURAL GAS PIPELINE COMPANY CERTIFICATES AND OTHER AUTHORIZATIONS

Notice of Proposed Rulemaking

(18 CFR, Parts 152, 153, 156, 157, 159)

(Issued September 15, 1965)

1. Pursuant to section 4 of the Administrative Procedure Act the Commission gives notice that it proposes to establish a schedule of filing fees relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemption under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority.

2. Congress has established the policy "that any * * * benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency * * * to or for any person * * *, except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible". Independent Offices Appropriation Act of 1952, 5 U.S.C. 140. In order to accomplish this objective, Congress authorized the head of each agency, which includes the Federal Power Commission, to prescribe by regulation such fees and charges as are determined to be fair and equitable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other

pertinent facts." Congress also provided that the regulations prescribed by agencies in the Executive branch shall be as uniform as practicable and subject to such policies as the President may prescribe. The Bureau of the Budget on behalf of the President has issued Circular No. A-25, September 23, 1959, which sets forth general policies for developing an equitable and uniform system of charges for certain Government services and property so as to implement the provisions of the Independent Offices Appropriation Act of 1952.

3. The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydroelectric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

However, we believe the public interest would be served by the establishment of a fair and equitable schedule of fees designed to recover our costs for the services rendered in processing applications for the certificating of interstate transportation and sale of natural gas for resale by pipeline companies and the other matters enumerated. We propose that all qualifying applicants pay a nominal filing fee of $50. In addition, we propose that applicants for authority to construct facilities for the transportation of gas pay a fee amounting to five one-hundredths of one percent of the estimated cost of the facilities for which a certificate is requested, payable at the time of filing, plus a fee of ten one-hundredths of one percent of the estimated cost of the facilities for which a certificate is granted and accepted.

The proposed fees are based upon the Commission's cost of conducting this function, the number of filings in this category and the estimated costs of the facilities for which application was made in recent years. We recognize that neither the Commission's costs nor the dollar value of facilities will remain static and, therefore, that it may be necessary to revise either the $50 fee or the percentage factors or both in the light of subsequent experience.

Finally, we are proposing the accounting to be followed by the companies in recording on their books the fee payments being proposed herein, that the companies charge Account 302, Franchises and Consents, with appropriate amortization, for the amounts of user charges paid by them if they are successful in obtaining certificates, and if the certificate is not granted, that the amounts expended be charged to Account 928, Regulatory Commission Expenses. Since a portion of the user charges will be assessed against the companies at the time the application is filed, we propose that the companies include the initial amounts paid in Account 186, Miscellaneous Deferred Debits, and clear that account to either Account 302 or

928 when final disposition is made of the application by the Commission.

4. Pursuant to section 4 of the Administrative Procedure Act and § 1.19(a) of the Commission's rules (18 CFR 1.19(a)), any interested person may submit to the Federal Power Commission by November 5, 1965, data, views, and comments in writing concerning the amendments now being proposed herein. The Commission will consider these written submittals before taking any action upon the proposed amendments. An original and nine copies of any such submittals should be filed.

5. These amendments to the Commission's Regulations Under the Natural Gas Act (18 CFR, Chapter I, Subchapter E) are proposed to be issued under the authority of the Natural Gas Act, as amended, particularly sections 1(c), 3, 7, 8 and 16 thereof (52 Stat. 822, 824, 825, 830; 56 Stat. 83; 68 Stat. 36; 15 U.S.C. 717(c), 717(b), 717f, 717g, 717o); Executive Order 10485 (18 F.R. 5397; 3 CFR, 1949-53 Comp. 970); section 5 of the Outer Continental Shelf Lands Act (67 Stat. 462, 464; 43 U.S.C. 1334 (c)); section 140 of Title 5 of the U.S. Code; and Budget Bureau Circular A-25 (September 23, 1959).

6. In consideration of the foregoing, the Commission proposes to amend Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations as follows:

a. Amend Subchapter E by adding a new Part 159 to read as follows:

"Part 159—Filing Fees

§ 159.1 Filing fees for applications not involving construction of facilities.

A filing fee of $50 shall accompany each of the following:

(a) Applications for exemption under section 1(c) of the Act;

(b) Applications to import or export natural gas under section 3 of the Act;

(c) Applications for a permit to maintain facilities at the borders of the United States under E. O. 10485;

(d) Applications and petitions to intervene requesting orders under section 7(a) of the Act;

(e) Applications for authority to abandon under section 7(b) of the Act;

(f) Applications under sections 7(c) and (d) of the Act for certificates of public convenience and necessity;

(g) Applications for a determination by the Commission pursuant to section 5 of the Outer Continental Shelf Lands Act;

(h) Amendments to any of the applications listed in (a) through (g) hereof.

§ 159.2 Filing fees for applications and amendments involving the construction of facilities.

In addition to the fees prescribed by § 159.1, applicants for a certificate of public convenience and necessity under sections 7(c) and (d) of the Act to construct and operate facilities shall pay the following fees:

(a) Within 30 days following the issuance of Notice of Application, an amount equal to 5/100 of one percent (i.e., 0.0005) of the estimated cost of construction of new facilities;

(b) Within 30 days following the grant of the certificate, an amount equal to 10/100 of one percent (i.e., 0.001) of the estimated cost of the facilities;

(c) If an amendment to a pending application increases the total cost of the facilities for which a

certificate is requested, an additional amount, computed with respect to the increase as provided in paragraph (a) hereof, shall be paid;

(d) If, upon completion of the facilities authorized, the actual cost thereof exceeds the estimated cost, the statement of actual cost, required to be submitted by § 157.20(c)(4) of this chapter, shall be accompanied by an amount equal to 15/100 of one percent of the excess of actual cost above estimated cost.

§ 159.3 Miscellaneous.

(a) *Method of payment.* Fee payments shall be by certified check or money order payable to the Treasurer of the United States. No fees will be refunded. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriation Act of 1952 (5 U.S.C. 140).

(b) *Exemption.* The provisions of this part shall not apply to independent producers, as defined in these regulations.

(c) *Amendments to outstanding certificates.* Applications to amend outstanding certificates, authorizations or orders will be treated as an initial application for the purposes of this part.

§ 159.4 Accounting for fees paid pursuant to Part 159.

A natural gas company subject to the provisions of this part shall account for the fees paid as follows: Pending Commission action on certificate and other applications, amounts paid when an application is noticed shall be charged to Account 186, Miscellaneous Deferred Debits, and held in suspense

until the application is either issued or denied. Upon grant of a certificate or other order by the Commission, the amount suspended in Account 186 and the additional charges then due shall be charged to Account 302, Franchises and Consents, with appropriate amortization, with a separate record maintained for each transaction. If the application is denied, the amount suspended in Account 186 shall be charged to Account 928, Regulatory Commission Expenses, in the year the application is denied.

• • •

b. Appropriate technical amendments to Parts 152, 153, 156 and 157 incorporating therein, by reference, the requirements of Part 159."

By direction of the Commission.

GORDON M. GRANT,
Acting Secretary.